

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
Implementation of Section 621(a)(1) of)	
the Cable Communications Policy Act of 1984)	MB Docket No. 05-311
as amended by the Cable Television Consumer)	
Protection and Competition Act of 1992)	

COMMENTS OF THE CITY OF HIALEAH, FLORIDA

These Comments are filed by the City of Hialeah, Florida (hereinafter referred to as the “City”) in response to the Federal Communications Commission’s (hereinafter “FCC” or “Commission”) Notice of Proposed Rulemaking (“Cable Franchising NPRM” or “NPRM”).¹ The NPRM specifically addresses the implementation of Section 621(a)(1) of the Communications Act of 1992, which provides that “A franchising authority...may not unreasonably refuse to award an additional competitive franchise.”² The City of Hialeah has not unreasonably refused to award additional competitive cable franchises. In fact, the City has encouraged and sought additional competitive cable providers, since competition promotes low cable rates and because competition enhances customer service among competitors.

It is the City’s position that local governments are the most qualified entities to ensure the proper issuance of cable franchises for new entrants into the video services field on a timely basis, while ensuring the achievement of Congressionally-stated policy goals, including responsiveness to local community needs. In support of this position, the City would like to inform the Commission about the recent history of cable television franchising in the City’s jurisdiction, and to respond to certain positions taken and questions posed by the Commission in its NPRM.

Introduction

The local cable franchising process promotes competition by giving equitable opportunities to *all providers* who want to use the rights of way to provide video service. Creating an exception for telephone companies that want to offer video service, by exempting them from requiring a franchise agreement, creates an unnecessary competitive advantage for

¹ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992*, MB Docket No. 05-189, Notice of Proposed Rulemaking (released November 18, 2005).

² See 47 U.S.C. §541(a)(1).

these companies. Local cable franchising ensures that providers are permitted access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements. Local cable franchising also ensures that the City's local community's specific needs are met and that local customers are protected. Without the franchising process, the City would be unable to provide this important supervisory function.

Congress did not intend for the Commission to preempt or supersede local government's franchising authority. Congress delegated specific powers to local franchising authorities which are not anti-competitive as some new entrants assert. The Cable Act acknowledges that municipalities are best able to determine a community's cable-related needs and interests. Accordingly, it would not be appropriate for the Commission to question the City in its identification of such needs and interests. The House Report states:

It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform Federal standards that are not continually altered by Federal, state or local regulation.³

Furthermore, in *Union CATV v. City of Sturgis*, the Court concluded that, "judicial review of a municipality's identification of its cable-related needs and interests is very limited. A court should defer to the franchising authority's identification of the community's needs and interests..."⁴ There is no reason in fact or law supporting the Commission's implementation of a different standard from that of the court. Thus, franchising should remain at the local level and any unreasonable denials should be reviewed by the judiciary.

The City has an interest and the right, delegated by Congress to prevent economic redlining, to establish and enforce customer service standards and to ensure the provision of adequate public, educational and governmental access channel capacity, facilities or financial support. Furthermore, for the minority of communities that may abuse their authority, the solution is not to undermine the entire franchising process. There is no need to create a new Federal bureaucracy in Washington to handle matters of specifically local interest.⁵

3 See H.R. REP. NO. 98-934, at 24, *reprinted in* 1984 U.S.C.C.A.N. at 4661.

4 See *Union CATV v. City of Sturgis*, 1997 FED App. 0075P (6th Cir.).

5 The City's franchising process ensures that customer service complaints, in most cases are handled within 24 hours or at the most, within 72 hours. The City has a rapport with the cable operator to ensure that issues are resolved. This type of relationship is a direct result of the local franchising process. It is inconceivable that a state or federally held franchise with dispute resolution maintained at the state or federal level is going to be comparable to the current service standards in the City. Finally, the Commission does not have the staff, budget or resources for handling complaints in such a timely manner.

The Franchising Process

Initial Franchise

Cable service cannot be provided unless there is a cable franchise granted by the franchising authority.⁶ The City's Cable Ordinance provides that "a franchise is nonexclusive, and shall not expressly or implicitly preclude the issuance of other franchises to operate cable systems within the city, or affect the right of the city to authorize use of city streets to other people to operate cable systems or for other purposes as it determines appropriate."⁷ The City is empowered by the cable television regulations of Title 47 of the United States Code to act as a Local Franchising Authority (LFA) with all of the powers and authority that status provides, including but not limited to negotiating and granting cable television franchises.

The public policy is that cable television regulations should include franchise procedures and standards which encourage the growth and development of cable systems and assure that cable systems are responsive to the needs and interests of the local community; and should promote competition in cable communications and minimize unnecessary regulation of cable systems.⁸ Accordingly, an LFA may not unreasonably refuse to award a competitive cable television franchise.⁹

A cable franchise functions as a contract between the local government, operating as the local franchising authority, and the cable operator. Like other contracts, its terms are reasonably negotiated. Under the Federal Cable Act it is the statutory obligation of the local government to determine the community's cable-related needs and interests and to ensure that these are addressed in the franchising process. However derived, whether requested by the local government or offered by the cable operator, once the franchise is approved by both parties the provisions in the franchise agreement function as contractual obligations upon both parties.

The City is authorized to regulate the construction, installation, operation and maintenance of Cable Television Systems pursuant to federal, state and local law. The City's franchise provides that changes in law which affect the rights or responsibilities of either party under the Franchise agreement will be subject to and shall be governed by the Communications Act, and any other applicable provision of federal, state or local law.

For example, the City's Cable Ordinance provides:

A franchise granted to an applicant pursuant to this article to construct, operate and maintain a cable system within the city, shall be deemed to constitute both a right and an obligation on the part of the Franchisee to provide the services and facilities of a cable system as required by the provisions of this article and the franchise agreement. The franchise agreement shall constitute all of the terms and

6 See 47 U.S.C. §541(d).

7 See The City of Hialeah Cable Television Ordinance, codified at Article IV or Chapter 18 of the Hialeah Code ("Cable Ordinance").

8 See 47 U.S.C. § 521.

9 See 47 U.S.C. § 541(a)(1).

conditions of the franchise that are finally negotiated and agreed upon by the city and Franchisee. Franchisee shall be bound by all documents or other portions of an application, including oral representations made by an applicant, or its representatives, before the city council, which the city relies upon as inducement to granting an initial, renewal, transfer or modification of a franchise, or taking other action relating to the franchise, and which are integrated by the city and Franchisee as an exhibit to the franchise or amendment thereof.¹⁰

Public Hearing

Local government officials encourage competition and new technologies since competing technologies and companies result in tangible benefits to the City and its residents. Public hearings provide an opportunity for residents, government officials and providers to voice their interests and concerns.

Florida law requires that no local government may grant a cable franchise unless it does so after holding a public hearing in which it considers the economic impact upon private property, the public need for the franchise, the capacity of the public rights of way to accommodate the system, the present and future use of the public rights of way to be used by the cable system, the potential disruption to existing users of the rights of way, the financial ability of the franchise applicant to perform, societal interests generally considered in cable television franchising, and any other substantive or procedural matters which may be relevant to consider.¹¹

While a franchise is negotiated by the local government as a contract, the process provides the cable operator additional due process rights, and consequently additional obligations on the local government. For example, the City of Hialeah requires that cable franchises are approved by Ordinance. The City requires two readings, with 10 days advertised notice prior to the second reading or public hearing. There is no specific time period for an item to be placed on the Council agenda, although administratively within the City there are deadlines (10 days) for administrative items to be reviewed by the Office of Management and Budget, if there are expenditures to be approved. The City's Cable Ordinance provides:

The city shall hold a public hearing to consider an application or applications for a franchise. The applicant shall be notified of the hearing and shall be given an opportunity to be heard. Based upon the application, the testimony presented at the public hearing, any recommendations of the city or staff, and any other information relevant to the application, the city shall decide by ordinance whether to grant or deny a franchise application and decide the terms and conditions of any franchise granted.

¹⁰ See The City of Hialeah Cable Television Ordinance, codified at Article IV or Chapter 18 of the Hialeah Code, Ordinance No. 02-18 ("Cable Ordinance").

¹¹ See Fla. Stat. § 166.046(2).

After complying with the above requirements, the city council shall approve or disapprove the proposed franchise agreement by ordinance or may direct that it be subject to further negotiation.¹²

Local Franchising/Local Oversight

If telephone providers, such as SBC, AT&T and Verizon are permitted to offer cable service without first obtaining a cable franchise from an LFA, these providers will be exempt from local oversight and will be less accountable to the local communities in which they operate than the cable systems with which they will be competing. This would be competitively unfair and harmful to local communities and their residents who would lose the ability to manage the rights of way. Such local oversight provides important consumer and public protections.

The City is the most familiar with the local needs of its residents. Establishing and ensuring compliance with local building and zoning codes, and public safety regulations are performed at a local level. For example, the City's Cable Ordinance provides,

A Franchisee shall, at its expense, protect, support, temporarily disconnect, relocate, or remove, any of its property when required by the city by reason of traffic conditions, public safety, street construction, street resurfacing or widening, change of street grade, installation of sewers, drains, water pipes, power lines, signal lines, tracks or any other type of municipal or public utility improvements.¹³

Additionally, in order to manage the rights of way for vehicles, pedestrians and utility-type providers, the City's Cable Ordinance requires that the cable operator keep full and complete plats, maps and records showing the exact locations of its facilities located within the public Streets, ways, and easements of the City. The Cable Ordinance specifically provides:

Any pavements, sidewalks, curbing or other paved area taken up or any excavations made by a Franchisee shall be done under the supervision and direction of the city under permits issued for work by the proper city officials, and shall be completed in such manner as to give the least inconvenience to city residents. A Franchisee shall, at its own cost and expense, and in a manner approved by the city, replace and restore any such pavements, sidewalks, curbing or other paved areas in as good a condition as before the work involving such disturbance was done, and shall also prepare, maintain and provide to the streets department full and complete plats, maps and records showing the exact locations of its facilities located within the public streets, ways and easements of the city. A construction plan with strand maps is required 30 days prior to commencement of construction in a particular area.¹⁴

¹² See The City of Hialeah Cable Television Ordinance, codified at Article IV or Chapter 18 of the Hialeah Code, Ordinance No. 02-18 ("Cable Ordinance").

¹³ See Id.

¹⁴ See Id.

Accordingly, the Commission cannot bypass the City's franchising process by considering establishing rules applicable only to telephone companies seeking to use the City's rights of way to offer a video product. The effect of these rules would be to usurp the statutory process established by Congress for cable franchise renewals to ensure that local needs are met.

Florida's Level Playing Field Statute

The public policy of the State of Florida is that cable television LFAs should grant overlapping franchises under terms and conditions which are not more favorable or less burdensome than those of other franchises.¹⁵ Furthermore, section 166.046(5) provides "Nothing in this section shall be construed to prevent any...city considering the approval of an additional cable service franchise in all or any part of the area of such...city from imposing additional terms and conditions upon the granting of such franchise as such...city shall in its sole discretion deem necessary or appropriate."

Cable Franchising in the City of Hialeah, Florida

Community Information

The City of Hialeah has a population of approximately 240,000 people. 94% of the consumers in the City's franchise area are Hispanic or Latino. The City's franchised cable operator is Comcast of South Florida I, Inc.

Competitive Cable Systems

The City does not have competitive cable systems. In December 2004, the City filed an Opposition to Comcast's Petition for Determination of Effective Competition, and as of this date the Commission has not yet ruled on the Opposition. The City has been waiting for the Commission to respond to the Opposition for over fourteen months. If the Commission takes an inordinate amount of time to consider an Opposition, how long would it take the Commission to respond to cable franchising issues the City faces every day? It appears that the Commission does not have the resources to investigate and be adequately informed of other issues effecting franchising matters in the City.

Hialeah's Current Franchise

The City's Franchise agreement expires in September, 2008. Under the statutory timeline laid out in the Federal Cable Act, the cable operator has a 6-month window beginning 36 months before the expiration of the franchise in which to request a renewal under the Federal Act. As a result, the City is currently in the renewal window and will be negotiating a franchise renewal with the incumbent provider.

¹⁵ See Fla. Stat. § 166.046(3).

The Importance of the City's Transfer Authority

In addition to having the power to grant an initial franchise, federal law recognizes that local governments have renewal and transfer authority. Pursuant to FCC rules, a local franchising authority has 120 days from the date of submission of a completed FCC Form 394, and any additional information required by the Franchise Agreement or applicable state or local law, to act upon an application to sell, assign, or otherwise transfer controlling ownership of a cable system.¹⁶ Accordingly, franchise grants, renewals, and transfers are all legislative acts because they involve policy decisions regarding the terms and conditions of the use of the public rights of way.

In *Charter Communications, Inc. v County of Santa Cruz*, the district court concluded that local governments have the right to deny a franchise transfer by a local government where there is substantial evidence for any one sufficient reason for denial.¹⁷ Moreover, the opinion holds that where the local government's judgment was reasonable, it necessarily follows that its decision to deny the transfer on the basis of that judgment was supported by a legitimate government interest.

The City of Hialeah granted a Franchise to Dynamic Cablevision of Florida, Inc. for a period of ten (10) years and provided two options to renew, each for a period of ten (10) years. In April, 1988, the Franchisee renewed the Franchise for the period from September, 1988 to September, 1998. The Franchise automatically renewed for another ten years. There were several transfers and mergers of the cable system between 1978 and 2003. Specifically, Dynamic Cable was transferred to Media One of South Florida Inc./AT&T Corporation and AT&T Broadband ("AT&T"). AT&T was then transferred to AT&T Comcast Corporation. AT&T Comcast Corporation subsequently changed its name to Comcast Corporation (Comcast of South Florida I, Inc.).

The City's Ordinance provides the following provision regarding transfer authority:

No transfer of a franchise shall occur without the prior consent of the city and unless application is made by the Franchisee, and city approval obtained, pursuant to section 18-107 hereof.¹⁸

One of the requirements in a transfer is that the Franchisee fulfills its obligations pursuant to the Ordinance and Franchise agreement. The City originally denied the transfer from AT&T to Comcast based upon the Franchisee's failure to provide benefits and services comparable to those benefits and services provided by the Franchisee to adjacent communities. As a result of the City's ability to exercise their transfer authority, the proposed Transferee agreed to revise the outdated 20-year old Ordinance, incorporating standards and obligations that more closely satisfied the needs of the City and its residents, including but not limited to, stronger customer service provisions, enforcement provisions, insurance and security provisions, state-of-the-art, I-

¹⁶ See 47 CFR §76.502.

¹⁷ *Charter Communications, Inc. v. Santa Cruz*, 304 F.3d 927, 2002 U.S. App. LEXIS 19631.

¹⁸ See The City of Hialeah Cable Television Ordinance, codified at Article IV or Chapter 18 of the Hialeah Code, Ordinance No. 02-18 ("Cable Ordinance").

NET, interconnection of public buildings and schools, and PEG. Accordingly, the transfer was ultimately approved by the City. Below are several provisions which were updated in the Ordinance.

“The City may grant a franchise for a period not to exceed fifteen years.” The City has the authority to limit the term for which franchises shall be granted. The Ordinance does not dictate the term for which Franchise is granted but simply provides a maximum limit. The Court in *Telesat Cablevision, Inc v. The City of Riviera Beach*, 773 F. Supp. 383 (September 13, 1991) held that the City of Riviera Beach’s cable ordinance, which contained a franchise term limit, to be constitutional.

“The City shall require in a franchise agreement that, prior to the franchise becoming effective, the Franchisee shall post a security fund with the City. Such fund may be in the form of a cash deposit, letter of credit, or performance bond as set forth in a franchise agreement... and to enable the City to effectively enforce compliance therewith, but in no event less than (200, 000.00).”

State-of-the-art means that level of technical performance, equipment, components and services more modern than that which has been developed and demonstrated to be generally accepted and used in the cable industry, excluding “tests” involving new products offered for one year or less. The system shall have, at a minimum, the capability of substantially similar capacity, cable products and cable services available from a system serving any other community in Miami-Dade County, Florida, owned and operated by the Franchisee, its parent, affiliates or subsidiaries as of the date of this article. The “State-of-the-art” provision was originally objected to despite the Franchisee’s pre-existing obligation under the Coral Gables Franchise, a City served by the same system.

Customer Service standards were established in the Ordinance.

Interconnection. If required by a renewal or initial grant of a franchise and upon the City’s request, a Franchisee shall interconnect public, education and government access channels programmed by the City or its lawful access users with any or all other cable systems located or serving subscribers within the City. Interconnection of systems shall be for the sole purpose of permitting interactive transmission and reception of public, government and education program.

Franchise Renewal

Similar to transfer authority, renewal authority is a critical local government function. One of the stated purposes of the Communications Act is to "establish an orderly process for franchise renewal which protects cable operators against unfair denials where operators' past performance and proposal for future performance meet the standards established by the

Communications Act."¹⁹ Once a renewal proposal has been submitted § 546(c) permits the franchising authority four months to make a decision regarding whether to grant or deny a renewal.

In circumstances where a cable franchising authority stalls or frustrates the orderly process under 47 U.S.C. § 546 to the detriment and prejudice of a cable operator, a district court has equitable power to require the franchising authority to continue to honor the original franchise agreement pending completion of the § 546 process. Finally, § 546(h) provides that judicial review is available for any “final” decision made by a franchising authority through the “informal” franchise-renewal process.

During a renewal process, LFAs are entitled to ask the Franchisee to submit proposals for how its system would be upgraded, and examine, in light of community needs, the quality of the Franchisee’s service, including signal quality, response to consumer complaints, and billing practices.

The City is currently in the renewal window, thus, the City has the opportunity to negotiate the renewal only if the City maintains franchising authority. The City’s existing Franchise commenced in 1979. There have been significant changes in technology, demographics, federal and state law since the Franchise agreement was negotiated. Therefore, the City would have the opportunity to negotiate benefits such as a PEG channel and a capital grant for PEG support for equipment and facilities, consistent with the City’s Ordinance. Furthermore, outdated franchise provisions can be updated addressing the City’s cable related needs considering changing technology and demographics. Finally, the City is in the best position to identify the needs of the Hispanic population.

PEG

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator’s proposal for a franchise renewal, that channel capacity be designated for public, educational, or governmental use, channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.²⁰

Accordingly, LFAs have the right to establish franchise requirements regarding channel capacity for government and education access programming. Furthermore, an LFA may require assurances that the cable provider will provide adequate educational and government access channel capacity, facilities, and financial support.

The City’s Ordinance requires the cable operator to provide capacity for public, educational, and/or governmental (“PEG”) access channels on the cable system. As discussed, due to a Franchise agreement negotiated in 1979, the City currently does not have any PEG

¹⁹ See 47 U.S.C. §521(5).

²⁰ See 47 U.S.C. § 531(b).

channels, despite the fact that these channels are extremely important to the City and the residents of Hialeah.

The City's Ordinance has the following PEG provisions:

(a) It is the purpose and intent of the City to require that all franchisees provide access channels, facilities, equipment and support sufficient to meet the needs and interests of the community with respect to public, education and government activities.

(b) A Franchisee granted an initial or renewal franchise pursuant to this article shall provide to the City, a grant for each subscriber, as represented in the subscriber base as defined in section 18-101, for each month for PEG capital support, as set forth in a franchise agreement. The actual amount of the individual subscriber and the monthly charges shall be set forth in the franchise agreement.

(c) A Franchisee granted an initial or renewal franchise pursuant to this article shall provide one or more access channels, and facilities dedicated to the exclusive use of the City and such other capital support for public, educational and/or governmental use as required in a franchise agreement and allocated at the sole discretion of the City. Provisions for increasing the number of PEG channels shall be set forth in a franchise agreement. In addition, a Franchisee shall cablecast to all City subscribers all County public, educational and/or government programming, provided, however, that the total number of PEG channels shall not exceed the number set forth in a franchise agreement..

(d) During the franchise term, the Franchisee shall provide, as specified in a franchise agreement or otherwise agreed to, equipment, facilities, technical and capital support for the production and cable casting of programming on the public, education and government channels. Applications for initial grants or renewal franchises shall include a proposal to provide such support.

(e) As set forth in a franchise agreement granted pursuant to this article, a Franchisee shall, subject to no less than two weeks advance notice in writing to the Franchisee, (i) tape or cablecast live events held in the City as may be designated by the City and (ii) provide coverage of City Council meetings.

(f) An application for an initial grant or renewal franchise may or, at the City's request, shall include proposals for the provision of an institutional network interconnecting City, educational institutions and/or other public facilities as designated by the City from time to time.

(g) An application for an initial grant or renewal franchise shall include a proposal for the interconnection of Franchisee to any or all other cable systems operating within the County for purposes of providing or sharing PEG access channels. Where applicable, an applicant shall include in the application a statement

outlining the status of the interconnection of its cable system to any and all cable systems operating within the County.

(h) As set forth in an initial or renewal franchise granted pursuant to this article, a franchise may provide for additional capital grants in lieu of or in addition to some or all of the facilities, equipment, and services referenced in this section.

Service to Public Buildings & Emergency Alert Requirement

The City's Franchise contains the following requirements:

Public Buildings: A Franchisee shall, upon request, provide to each and every floor of all public buildings including, but not limited to, city buildings, parks, community and day-care centers, and any other public building designated by the city, with, at minimum, one free connection to any on-line service provided by the Franchisee in Miami-Dade County. Such on-line service will provide access to the Internet. Upon request, each city building, park, community center and day-care center within the city, and any other public building designated by the city, shall receive, at minimum, one free cable modem that and free, unlimited access to the on-line service.

Emergency Alert: A cable system shall include an "emergency alert" capability, which shall allow the mayor or designee, to the extent permitted by applicable law, to remotely override the audio of all channels on the cable system or to allow for video crawl over all channels.

Customer Service

Because service issues are local, customer service must be handled at the local level. These complaints are made and addressed within the community. There are thousands of customer service complaints across the country, which are addressed at the local level. The State or the Commission is simply not equipped with handling the sheer number of these customer service complaints.

The City's Franchise provides that the Franchisee agrees to comply with and to implement and maintain any practices and procedures that may be required to monitor compliance with customer service requirements set forth in the City's Cable Television Ordinance which applies to all cable operators. The Ordinance requires specific information relating to the Franchisee's "full schedule and description of services, service hours and location of the customer service office of the Franchisee or offices available to Subscribers, and a schedule of all rates, fees and charges for all Cable Services provided over the Cable System."²¹

²¹ See The City of Hialeah Cable Television Ordinance, codified at Article IV or Chapter 18 of the Hialeah Code, Ordinance No. 02-18 ("Cable Ordinance").

Below are illustrative customer service obligations which help the City ensure that the cable operator is treating the residents in accordance with federal standards and the terms agreed to in its Franchise.

A Franchisee shall develop written procedures for the investigation and resolution of all subscriber or city resident complaints, including, but not limited to, those regarding the quality of service and equipment malfunction, which procedures shall be subject to the review and approval by the city. A subscriber or city resident who has not been satisfied by following the procedures of the Franchisee may file a written complaint with the city clerk, who shall investigate the matter and attempt to resolve the matter. The good faith or lack thereof of the Franchisee in attempting to resolve subscriber and resident complaints in a fair and equitable manner shall be considered in connection with the renewal application of the Franchisee. Franchisee shall maintain a complete list of all complaints not resolved within three days of receipt and the measures taken to resolve those complaints. This list shall be compiled in a form to be approved by the city. It shall be compiled on a monthly basis. The list for each calendar month shall be supplied to the city no later than the 15th day of the next month. Franchisee shall also maintain a list of all complaints received, which list shall be provided to the city within three days of request by the city, as part of an inquiry by the city regarding Franchisee's compliance with this subsection.

Franchisee shall permit the city designee to inspect and test the technical equipment and facilities of the system upon reasonable notice not to be less than 72 hours, except in an emergency.

Franchisee shall provide written notice in its monthly billing, at the city's request, of any events or public service announcements. The city shall make such a request in writing, with reasonable notice prior to the mailing of any billing by Franchisee, such that Franchisee's regular billing cycle shall not be interrupted. City shall pay printing costs and incremental postage expenses for such notices.

Build Out

Build out requirements ensure that there is a simple, objective, easily administered test of economic feasibility as to where cable service has to be available. Having a clear test helps to ensure that the cable company's facilities are extended into all neighborhoods meeting this test and that service is offered to all residents in such neighborhoods, regardless of race, age, income or other extraneous factors.

Since the test must be locally tailored so as to take into account local geography, demographics, and other factors which affect population density and ability to provide service, a test applied statewide or nationally would be ineffective. Since the rights of way are public property, maintained using public funds, the rights of way cannot be used in a discriminatory fashion. It is the City's responsibility to ensure that public property is used to provide service wherever there is sufficient population density.

Finally, the City has a duty to ensure that modern communications services are offered broadly to as large a number of the residents of the City as reasonably possible, without regard to age, race, and income or other improper service criteria.

The City's Franchise provisions were negotiated with the cable operator, taking into consideration the cable operator's business needs, engineering and construction requirements and the need to provide access to service on a non-discriminatory basis.

State-of-the Art

A Franchise entered into ten or fifteen years ago, no longer meets the needs of the City as the demographics have changed. In order to ensure that the City's residents have access to current telecommunications technologies, the City's Cable Ordinance contains the following upgrade provisions:

State-of-the-art means that level of technical performance, equipment, components and services more modern than that which has been developed and demonstrated to be generally accepted and used in the cable industry, excluding "tests" involving new products offered for one year or less. The system shall have, at a minimum, the capability of no less than the channel capacity, products and services available from a system serving any other community in Miami-Dade County, Florida, owned and operated by the Franchisee, its parent, affiliates or subsidiaries serving a similarly sized community outside the state, except as otherwise set forth in a franchise agreement. In no event shall a system having a bandwidth of less than 750 MHz be considered "state-of-the-art." Nothing herein shall be construed to require a Franchisee to employ any specific transmission technology.

Most favored nation. Pursuant to the requirements of a franchise agreement, a Franchisee shall provide, at a minimum, the same facilities, services, products and benefits available on any system serving any other community in Miami-Dade County, owned and operated by the Franchisee, its parent, affiliate or subsidiary.

I-NET

The City's Ordinance contains the following I-NET provisions:

A Franchisee shall make a proposal to the city for the installation, operation, maintenance and funding for an Institutional Network ("I-NET"). The I-NET shall, at minimum, take into consideration the interconnection of all government and other public buildings, or people as designated by the city, with minimum technical facilities as shall be specified subject to negotiation between the city and the Franchisee and set forth in a franchise agreement. A Franchisee may provide the city, subject to city approval, with an equivalent of an I-NET, based on current technology, or a capital grant in lieu of the obligation set forth herein.

Where an I-NET already exists in the city, an applicant for a franchise shall provide the city with a capital grant in an amount which represents the cost of an Institutional Network, or, at the city's sole option, alternative facilities, equipment and support, including, but not limited to, a new Institutional Network, in satisfaction of Franchisee's obligation to provide the city with an I-NET as provided herein.

Insurance and Security/Bonding Requirements

The City has a duty to protect its residents by ensuring that obligations are met and injured members of the community are compensated if the provider should encounter financial difficulties or file for bankruptcy. The City's Franchise agreement contains the following insurance, security fund and construction bond requirements:

A Franchisee shall be required by the city to maintain, and by its acceptance of the franchise, specifically agrees that it shall maintain, throughout the entire term of the franchise including any renewals thereof, insurance coverage insuring the Franchisee with respect to the construction, operation and maintenance of the cable system, and the conduct of the Franchisee's business in the city, as described below and as required to satisfy all requirements of Florida law.

- (1) Comprehensive general liability insurance including contractual liability, explosion, collapse and underground property damage, bodily injury and broad form property damage, personal and advertising injury and products/completed operations coverage. The Franchisee shall carry limits with a combined single limit of no less than \$3 million for each occurrence naming the city as an additional insured. The Franchisee shall require any subcontractors to provide adequate insurance and provide proof of insurance to the city as well.
- (2) The Franchisee shall carry workers' compensation and employers liability insurance in compliance with state law. The Franchisee shall require any subcontractors to provide workers compensation insurance for all of the subcontractors' employees.
- (3) Automobile liability insurance covering all owned, hired and non-owned vehicles used in connection with any activities arising out of this agreement. Such insurance shall afford coverage with a combined single limit of no less than \$1 million for each occurrence. The Franchisee shall require any subcontractors to provide automobile liability insurance for all of the vehicles used by subcontractors arising out of the franchise.

Security Fund: The City requires that, prior to the franchise becoming effective, the Franchisee shall post a security fund with the City in the form of a cash deposit, letter of credit, or performance bond in the amount of \$500,000.

Construction Bond: The City requires in a franchise agreement that, prior to any cable system construction, upgrade, rebuild or other significant work in the streets, a Franchisee shall establish in the favor of the city a construction bond in an amount specified in the franchise agreement or other authorization as necessary to ensure the faithful performance of the Franchisee of the construction, upgrade, rebuild or other work, but in no event shall the amount of the bond be the lesser of \$500,000 or the value of construction.

Franchise Fees

With respect to payments by a Franchisee, the Cable Act permits LFAs to collect up to 5% of gross revenues from cable providers as compensation for the use of public rights-of-way. However, in 2001, the State of Florida adopted the Florida Communications Services Tax (“CST”) Simplification Act, which superseded and preempted the authority of municipalities and counties in Florida to directly levy or collect cable television franchise fees.²²

Under the CST, providers of cable, telephone and other communications services remit the communications tax directly to the Florida Department of Revenue, which takes an administrative fee and remits the balance to the respective LFAs. Rates were established by the State for each taxing jurisdiction based upon historical revenues under prior franchise fee and taxing schemes with the intent that the jurisdictions would not receive net returns significantly different than they received collectively from the prior distinct funding sources.

Enforcement Mechanisms

The City’s Ordinance provides for the following enforcement mechanisms by which we are able to ensure that the cable operator is abiding by its Franchise agreement:

A franchise may be revoked by the city council for failure of the Franchisee to construct, operate or maintain the cable system as required by this article or franchise agreement, or for any other material violation of this article or material breach of the franchise agreement. To invoke the provisions of this subsection (a), the city shall give the Franchisee written notice, by certified mail at the last known address, that Franchisee is in material violation of this article or in material breach of the franchise agreement and describing the nature of the alleged violation or breach with specificity. If within 30 days following receipt of such written notice from the city to the Franchisee, the Franchisee has not cured such violation or breach, or has not entered into a written agreement with the city on a program to cure the violation, or has not demonstrated that the violation cannot be cured, the city may give written notice to the Franchisee of its intent to revoke the franchise, stating reasons.

22 See Fla. Stat. §§ 202.13(3), 202.20(2)(b)(1)(b), and § 202.24(1).

Prior to revoking a franchise under subsection (a) hereof, the city council shall hold a public hearing, upon no less than 30 days written notice to the Franchisee, at which time the Franchisee and the public shall be given an opportunity to be heard. Following the public hearing, the city council may determine whether to revoke the franchise based on the evidence presented at the hearing, and other evidence of record. If the city council determines to revoke a franchise, it shall issue a written decision setting forth the reasons for its decision. A copy of such decision shall be transmitted to the Franchisee.

As previously stated, neither the State nor the Commission has the staff or the budget to respond to violations in a timely manner. In reality, City hall gets the telephone calls from the local residents, not the FCC. The City needs and expects a timely response to protect public safety and to ensure local service issues are handled in a timely manner.

Responses/Comments to the Notice of Proposed Rulemaking

The Commission does not have the legal authority to issue rules which preempt LFAs authority.

Providers seeking to provide multichannel video service over upgraded local wireline networks have alleged that the local franchising process serves as a barrier to entry. Accordingly, the FCC seeks comment on how it should implement 47 U.S.C. § 541(a)(1), which provides that a franchising authority may not unreasonably refuse to award an additional competitive franchise. The City respectfully asserts that the Commission should not adopt rules which would preempt its duly-adopted Cable Television Ordinance, since to do so would conflict with Congress' intent and exceed the Commission's Congressionally-delegated authority. Any proposed Commission rule which interfere with the City's Congressionally-granted authority. The Cable Act states, in relevant part:

Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter [nor] to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.²³

It was the intent of the Cable Act to "preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects... [and that] the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."²⁴ Moreover, Congress provided that where LFAs treated Franchisees unreasonably, Franchisees had the right to seek judicial relief.²⁵ Congress did not authorize the Commission to

23 See 47 U.S.C. § 556(a)&(b).

24 See NPRM at n. 18, citing, H.R. Rep. No. 98-934 (1984).

25 See 47 U.S.C. § 555(a).

make rules preempting local laws which are not inconsistent with the Act, nor inserting itself into the local franchise negotiation process. Thus, any proposed Commission rule which would circumvent this process would be counter to Congress' express intent that franchising take place at the local level and that any unreasonable denials are reviewed by the judiciary.

The local franchising process is not unreasonably causing refusals of competitive franchise grants.

New providers, including Verizon AT&T and SBC are seeking to provide multichannel video service over upgraded local wireline networks so that they can offer a competitive "triple play" (voice, Internet and video) to cable operators' triple play. These providers want to circumvent the Cable Act's local cable franchising process via federal and state legislation and via Commission rules as reflected in this NPRM.

In Florida, these new providers, as telephone companies, have the legal right and ability to deploy an advanced network.²⁶ However, in order to offer the video component, LFAs require a franchise agreement. In fact, a number of years ago, BellSouth had obtained a number of cable franchises which the company failed to build. Therefore, BellSouth never offered cable service even though they held a number of cable franchises.

For example, Verizon has stated that it will deliver its FiOS television service by constructing the system primarily as a telephone system, not subject to cable television franchise authority. Verizon argues that it may begin FTTP system construction at will, even in communities where it is not actively seeking a cable television franchise, because the system will be used to provide voice and data services, which is not regulated by cable television ordinances, regardless of a cable franchise. Therefore, Verizon has been deploying its FTTP network without having yet obtained video franchises from many of the LFAs in the communities in which they are building. In those communities, it can market and use this network to bring its phone and high-speed data products to consumers, and include its wireless product in the bundle. Its video product can join that bundle as Verizon obtains franchise agreements, but there is no legal impediment to construct and begin deriving income from its advanced system while it negotiates video franchise agreements with LFAs.

Thus, these new providers, as telephone companies have an advantage over cable providers since the telephone companies have independent right of way authority and may begin construction or upgrade their facilities without LFA regulation. However, cable operators are not permitted to begin system construction until the franchise agreement is negotiated and finalized.

Build-Out Requirements and Red-Lining

Build out requirements encourage competition and prevent red-lining of communities since these requirements prevent profit optimization by denying new providers the ability to

²⁶ See Fla. Stat. §337.401.

select areas where high-margin customers may reside. LFAs have a congressionally-mandated duty to manage the rights of way to ensure certain members of the community are not denied access to service due to their race or income levels. Accordingly, a Commission rule preventing LFAs from imposing build-out requirements could perpetuate redlining.

The City's response to Verizon's arguments

Verizon has stated that the local franchising process takes too long due to inertia, arcane application procedures, bureaucracy or inattentiveness by LFAs arguing that it would have to negotiate with 10,000 LFAs in order to offer video service in its current service area. However, entrants, such as Verizon, with multi-use systems have two other options to offer video service without obtaining a franchise from LFAs: satellite and OVS. Furthermore, in the case of obtaining a franchising agreement for use of the rights of way, in Florida, Verizon will be able to reach a significant number of the population by dealing with a relative few LFAs with jurisdiction over the State's various areas of dense population.

Verizon also argues that that local franchising requirements can result in "outrageous demands by some LFAs" wholly unrelated to video services or franchising rationale. However, it is evident that the City's franchising process, with Comcast illustrates that the parties were able to negotiate in good faith over the exact levels of support to be provided to the City and part of that process was the County's willingness to set forth its justifications for the requests being made.

Elected officials hear from all interested parties, and make a balanced judgment as to what level of support will be required, taking into account the LFA's future cable-related community needs and the provider's ability to make a reasonable profit on its investment in the community.

Conclusion

The City disagrees with the Commission's tentative conclusion that the FCC has the authority to ensure that LFAs not "unreasonably refuse" to award competitive franchises. Congress did not grant the Commission jurisdiction to directly implement §541(a)(1). Accordingly, the Commission does not have enforcement authority since this is a function of the federal judiciary.

As to whether the Commission should address actions at the state level if they are deemed to be unreasonable barriers to entry, the City opposes any such state legislation. There are adequate judicial remedies to redress any unreasonable barriers to entry. The Commission has no authority to preempt state statutes as the NPRM suggested.

Finally, the City agrees with the Commission's tentative conclusion, that it is not unreasonable for an LFA, in awarding a franchise, 1) to assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides; 2) allow a cable system a reasonable

period of time to become capable of providing cable service to all households in the franchise area, and 3) require adequate assurance that the cable operator will provide adequate access channel capacity, facilities, or financial support.

The City is concerned that its authority as an LFA not be decreased, either by FCC rule or by the Florida Legislature. Local cable franchising ensures that local cable operators are allowed access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner in accordance with local requirements. Local cable franchising also ensures that the City's specific needs are met and that local customers are protected.

In light of the foregoing, the City respectfully requests that the Commission does not interfere with local government authority over franchising or otherwise impair the operation of the local franchising process as set forth under existing federal law with regard to either existing cable service providers or new entrants. The Commission should not permit providers to simply circumvent the local franchising process.

Respectfully submitted this 10th day of February, 2006,

The City of Hialeah, Florida



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